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# Appealable Orders, Prohibition, and Mandamus in Minnesota

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## Appealable Orders, Prohibition, and Mandamus in Minnesota

### I. INTRODUCTION

The two competing policy considerations basic to the problem of establishing the proper scope of the exercise of appellate jurisdiction are concerned primarily with judicial economy. The first consideration is the greater efficiency of the unitary appeal. The burden of the appellate court is lessened by decreasing the number of proceedings before it and by relieving it from passing on questions which may have no effect upon the ultimate disposition of the case. Also, the unitary appeal eliminates the disruption of the trial court system caused by the intervention of an appeal prior to final judgment. However, the second consideration recognizes that there is also economy in the prompt reversal of error. An erroneous ruling made early in the litigation may affect the validity of the entire proceeding. If appellate proceedings may be invoked at the time such error is made, the waste caused by conducting a trial which will ultimately be declared a nullity will be eliminated.

The purpose of this Note is to examine the resolution of the conflict between these two policies effected by Minnesota law. To accomplish this aim it is necessary to do more than define and analyze the right of appeal. The extraordinary procedures whereby questions involving the actions of district courts may be brought before the supreme court<sup>1</sup> must also be considered. Limitations placed upon the right to appeal can be made meaningless by an overexpansion of the scope of extraordinary writs issuing from the appellate court. Conversely, many of the considerations favoring restrictions upon the availability of the extraordinary writs will be defeated by a liberal allowance of appeal.

### II. APPEALABLE ORDERS

Minnesota Statutes section 605.09 (1965) defines generally the judgments and orders in civil cases from which an appeal may be taken to the Minnesota Supreme Court. It has been held consistently that the court has no jurisdiction to hear an appeal from an order which does not fall within the language of the

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1. The scope of this Note does not extend to the procedures for obtaining appellate review before other courts or agencies.

statute.<sup>2</sup> This jurisdictional prerequisite may not be avoided by any action of the trial court<sup>3</sup> or by consent of the parties.<sup>4</sup>

The disadvantages of the jurisdictional approach are considerable. Although the statute represents the legislature's resolution of the competing policies involved and is couched in rather broad language, a literal application of its terms often produces results contrary to any view of those policies. Cases do arise in which exceptional circumstances demand that an appeal be heard from an order which should usually be found nonappealable. By treating the statute as an inflexible limitation the court is denied the power to accommodate these cases. The policies affecting the exercise of appellate jurisdiction can be fully realized only by vesting in the appellate court discretion to hear an appeal whenever appropriate.

On occasion the court has deviated from the jurisdictional approach in an indirect manner. Frequently, after dismissing an appeal taken from a nonappealable order, the court has discussed the merits of the action.<sup>5</sup> When the court rejects the appellant's contentions, such discussions might be taken as merely an attempt to discourage a subsequent appeal on the question. However, other cases indicate a further purpose. In *Koenigs v. Werner*<sup>6</sup> an appeal was attempted from an order granting a new trial.<sup>7</sup> Although the appeal was dismissed, the court found the appellant's contentions on the merits to be well taken. It was suggested that "before retrial, the court may consider the advisability of modifying its order. . . ."<sup>8</sup> Certainly most trial court judges would accept the suggestion. Similarly, in *Miller v. Market Men's Mut. Ins. Co.*,<sup>9</sup> after finding an order denying a motion to allow intervention nonappealable, the court discussed the order favorably to the intervenor and stated that the trial court's previous ruling on the motion would not be res judicata

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2. See, e.g., *Tryggeseth v. Norcross*, 262 Minn. 440, 115 N.W.2d 56 (1962); *Laramie Motors, Inc. v. Larson*, 253 Minn. 484, 92 N.W.2d 803 (1958). Cf. *Brown's Bay Marine Corp. v. Skrypec*, 271 Minn. 523, 136 N.W.2d 590 (1965).

3. *Weckerling v. McNiven Land Co.*, 231 Minn. 167, 42 N.W.2d 701 (1950).

4. *Morey v. School Bd. of Independent School Dist.* 492, 268 Minn. 110, 128 N.W.2d 302 (1964).

5. See, e.g., *Alho v. Sterting*, 266 Minn. 71, 122 N.W.2d 869 (1963); *Northwest Holding Co. v. Evanson*, 265 Minn. 562, 122 N.W.2d 596 (1963).

6. 263 Minn. 80, 116 N.W.2d 73 (1962).

7. For a discussion of the appealability of such an order see notes 99-111 *infra* and accompanying text.

8. 263 Minn. at 85, 116 N.W.2d at 76.

9. 262 Minn. 509, 115 N.W.2d 266 (1962).

as to a subsequent motion to intervene. Although the power of suggestion is probably as effective a remedy to the appellant as an actual decision on the merits, the above cited cases are infrequent exceptions, randomly made, and make no substantial inroad upon the jurisdictional approach.

*State v. J. P. Sinna & Sons, Inc.*<sup>10</sup> is a more definite departure from the jurisdictional prerequisite approach to appealability. After finding the order appealed from to be nonappealable, the court stated that since the appellant could obtain review by refusing to obey the order and appealing the contempt citation, the merits of the appeal would be discussed. Since the order of the trial court was affirmed, the *Sinna* case could be considered among those in which the court's only intention was to discourage a subsequent groundless appeal.<sup>11</sup> More broadly, the case could be read as suggesting that any order which commands a party to follow a certain course of conduct is appealable,<sup>12</sup> since the order may be reviewed indirectly by appeal from an order holding appellant in contempt.<sup>13</sup> If the latter rationale is followed as holding, the case could have considerable impact.

While some may find it desirable to eliminate the circuitry of the appeal from a contempt citation as a means of obtaining review of another order, it could be argued that the inconvenience of this method is advantageous. Intermediate appeals probably would be held in less disfavor by courts and legislatures if such appeals were taken only when the appellant was firmly convinced of the substantiality of his assertions. By interposing the contempt citation between the trial court's order and appellate review the number of frivolous appeals undoubtedly is lessened. Contempt jurisdiction should not be allowed to become a convenient means of evading limitations upon the right of appeal.<sup>14</sup>

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10. 271 Minn. 430, 136 N.W.2d 666 (1965).

11. However, it is significant that the court affirmed the order rather than dismissing the appeal.

12. Among the more common orders which would be made appealable by such a rule would be discovery orders and orders as to child custody and property made pendente lite in a divorce action.

13. *Proper v. Proper*, 188 Minn. 15, 246 N.W. 481 (1933).

14. The availability of the writ of prohibition as a means of reviewing pretrial orders has greatly reduced the number of situations in which the contempt avenue is necessary. See, e.g., *Thermorama, Inc. v. Schiller*, 271 Minn. 79, 135 N.W.2d 43 (1965); *Brown v. St. Paul City Ry.*, 241 Minn. 15, 62 N.W.2d 688 (1954). Prohibition has few of the procedural disadvantages suggested by the *Sinna* case. To hold an order appealable creates a right to appeal from all such orders. Prohibition is discretionary and does not issue as of right. Under the latter procedure the court may limit its review to exceptional cases. Use of the writ is discouraged by the greater difficulty of obtaining review.

The *Sinna* case does not expand the power of the court to decide issues of appealability in accordance with the policies of judicial economy. If it does engraft an exception upon the statute, that exception is without the support of authority or reason.

It is arguable that a statute delineating appealable orders cannot be an absolute limitation upon the jurisdiction of the supreme court. The Minnesota Constitution provides that the court shall have "appellate jurisdiction in all cases."<sup>15</sup> Accordingly, the statute could be regarded as defining appeals as of right—setting forth only those situations in which the court cannot decline jurisdiction. Beyond the statute, it may be argued, the court has a constitutional power to hear any appeal.<sup>16</sup> This interpretation presents a particularly attractive means of introducing the discretionary appeal into the Minnesota appellate structure. If derived from a constitutional basis, the question of appealability would be removed from the uncertainties of legislative revisions. Furthermore, given the legislative history of the present appeal statute,<sup>17</sup> the court is probably foreclosed from overruling its holdings establishing the jurisdictional approach except on a constitutional ground.

#### A. JUDGMENTS ENTERED IN DISTRICT COURT

*An appeal may be taken to the supreme court:*

*From a judgment entered in the district court . . . .*

MINNESOTA STATUTES § 605.09(a) (1965).

This subsection is the equivalent of Minnesota Statutes 605.09(1) (1961) which existed prior to the general revision of the appeal statutes in 1963.<sup>18</sup> The earlier statute included a provision defining the scope of review on appeal from a judgment. That clause is now contained in Minnesota Statutes section 605.05 (2) (1965) and is applicable to all appeals. No other change in substance was effected by the 1963 amendment.

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15. MINN. CONST. art. 6, § 1.

16. The validity of this argument turns upon the construction given the word "cases" in the constitutional provision. If a case means an action, the argument probably is not well taken since the present appeal statute allows at least one appeal to be perfected in every district court action. See MINN. STAT. § 605.09(a), (d) (1965).

17. In 1958 the Judicial Council proposed a revision which would have created a discretionary appeal procedure. MINN. LAWS SERV. 1958, p. 17. The proposed revision was subsequently enacted without the discretionary appeal provision. Minn. Laws 1963, ch. 806, § 8.

18. Only the history of the more recent amendments to the statute will be discussed in this Note. For a more extensive discussion of the earlier history of section 605.09 see Cunningham, *Appealable Orders in Minnesota*, 37 MINN. L. REV. 309 (1953).

Subsection 605.09(a) permits an appeal to be taken from a judgment entered at any point in the litigation.<sup>19</sup> An order for judgment is not appealable under this or any other section of the statute. Thus, an order granting a motion for summary judgment<sup>20</sup> or for judgment notwithstanding the verdict<sup>21</sup> is not appealable.<sup>22</sup> In so holding, the court has described an order for judgment as "an intermediate order which requires a subsequent judgment to give it effect. . . ."<sup>23</sup> This language suggests that an appeal from an order for judgment would violate the policies favoring a unitary appeal. Because the entry of judgment is usually a ministerial act to be performed by the clerk,<sup>24</sup> it may appear that an order for judgment effectively terminates the litigation and that an appeal from such an order would not be inconsistent with the unitary appeal concept. However, the order for judgment frequently does not end the proceeding. Following such an order post trial motions will often be made and the entry of judgment may be stayed pending determination of these motions.<sup>25</sup> Thus, to allow an appeal from an order for judgment would raise the possibility of a second appeal from a ruling on the post trial motions.

However, several recent cases have raised a doubt as to whether the court will adhere to its position regarding orders for judgment, particularly the order for judgment notwithstanding the verdict.<sup>26</sup> Appeals taken from orders for summary judg-

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19. A judgment of dismissal is appealable even if made without prejudice. *H. Christiansen & Sons, Inc. v. City of Duluth*, 225 Minn. 486, 31 N.W.2d 277 (1948); *Bolstad v. Paul Bunyan Oil Co.*, 215 Minn. 166, 9 N.W.2d 346 (1943). However, an order dismissing an action without prejudice usually is not appealable. *Fischer v. Perisian*, 251 Minn. 166, 86 N.W.2d 737 (1957); *Voth v. Beckman*, 250 Minn. 325, 84 N.W.2d 925 (1957).

20. *Nelson v. B & B Inv. Co.*, 264 Minn. 393, 119 N.W.2d 713 (1963); *Shema v. Thorpe Bros.*, 238 Minn. 470, 57 N.W.2d 157 (1953).

21. *Laramie Motors, Inc. v. Larson*, 253 Minn. 484, 92 N.W.2d 803 (1958); *Sanderson v. Northern Pac. Ry.*, 88 Minn. 162, 92 N.W. 542 (1902).

22. This rule can cause a forfeiture of all right to appellate review. In *Nelson v. B & B Inv. Co.*, 264 Minn. 393, 119 N.W.2d 713 (1963), for example, judgment was entered shortly after the order for summary judgment. Time for appeal from the judgment had expired long before the appellant was apprised, by the court, of the fact that the order from which he had appealed was nonappealable.

23. *Shema v. Thorpe Bros.*, 238 Minn. 470, 471, 57 N.W.2d 157, 158 (1953).

24. MINN. R. CIV. P. 58.01.

25. MINN. R. CIV. P. 58.02.

26. The former MINN. STAT. § 605.06 (1961) had been construed to permit an appeal to be taken from the whole of an order entered in response to an alternative motion for judgment notwithstanding the ver-

ment<sup>27</sup> and for judgment notwithstanding the verdict<sup>28</sup> have frequently been heard without discussion of the appealability of the order. In *Poynter v. Albrecht*<sup>29</sup> an appeal was taken from an order for judgment notwithstanding the verdict and, alternatively, for a new trial.<sup>30</sup> Although the appeal from the order granting the new trial was dismissed on the ground that the order was nonappealable,<sup>31</sup> the court reversed the order for judgment notwithstanding the verdict. While the question is not discussed in the opinion, the court clearly assumed that the order for judgment notwithstanding the verdict was appealable irrespective of the fact that judgment was not actually entered. Thus, as to orders for judgment notwithstanding the verdict, there has developed a direct contradiction between the holding of the most recent case expressly ruling on the question<sup>32</sup> and the unexplained assumptions underlying the subsequent practice of the court.<sup>33</sup> Since an order for summary judgment has recently been held nonappealable,<sup>34</sup> earlier cases allowing appeals from such orders may be no more than unintentional oversights.

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dict or new trial. See, e.g., *Allison v. Chicago, G.W. Ry.*, 240 Minn. 547, 62 N.W.2d 374 (1954). Although it was held that such an appeal was proper only if that part of the order ruling on the motion for a new trial were appealable, an appeal was available if the motion for judgment notwithstanding were granted and the motion for new trial denied. *Laramie Motors, Inc. v. Larson*, 253 Minn. 484, 92 N.W.2d 803 (1958). However, this appeal was clearly eliminated by the repeal of § 605.06 in the 1963 revision.

27. *Korengold v. City of Minneapolis*, 254 Minn. 358, 95 N.W.2d 112 (1959); cf. *Hursh v. Village of Long Lake*, 247 Minn. 1, 75 N.W.2d 602 (1956).

28. See *Sandstrom v. The AAD Temple Bldg. Ass'n, Inc.*, 267 Minn. 407, 127 N.W.2d 173 (1964); *Hacker v. Berckner*, 263 Minn. 278, 117 N.W.2d 13 (1962); *Nelson v. Minneapolis, St. P. & S. Ste. M. R.R.*, 260 Minn. 61, 108 N.W.2d 720 (1961). In none of these cases was the appeal taken from the whole order. See note 26 *supra*.

29. 266 Minn. 245, 123 N.W.2d 355 (1963).

30. See MINN. R. Crv. P. 50.02.

31. The appeal from the whole order was not available since the ruling on the motion for new trial was not appealable. See note 26 *supra*.

32. *Laramie Motors, Inc. v. Larson*, 253 Minn. 484, 92 N.W.2d 803 (1958).

33. See cases cited notes 26-27 *supra*.

34. *Nelson v. B & B Inv. Co.*, 264 Minn. 393, 119 N.W.2d 713 (1963).

## B. ORDERS REGARDING INJUNCTIONS AND ATTACHMENTS

*An appeal may be taken to the supreme court:*

. . .

(b) *From an order which grants, refuses, dissolves, or refuses to dissolve an injunction;*

(c) *From an order vacating or sustaining an attachment*

. . . .

MINNESOTA STATUTES § 605.09 (1965).

Before the 1963 amendments these two provisions were both contained in subsection 605.09(2). The clause allowing an appeal to be taken "from an order granting or refusing a provisional remedy. . . ." was repealed in 1963. No change in substance was made in the provisions regarding injunctions and attachments.

The provisional remedy appeal was difficult to define and seldom used.<sup>35</sup> Practically, its elimination caused no contraction of the supreme court's jurisdiction. Although the cases construing this clause failed to establish workable guidelines for its application, they did indicate that an order involving a provisional remedy was nonappealable unless the order was based on the merits and clearly affected some right of the parties.<sup>36</sup> Any order formerly appealable as granting or refusing a provisional remedy would seem appealable under the present statute as "an order involving the merits of the action or some part thereof. . . ."<sup>37</sup>

The term "injunction" in subsection 605.09(b) has been construed to include temporary as well as permanent injunctions.<sup>38</sup> However, an order regarding a temporary injunction may not be appealed if entered *ex parte*.<sup>39</sup> In all other respects, this subsection is unambiguous and has caused few difficulties.<sup>40</sup>

Since it has generated no case law in recent years, no discussion of the provision allowing appeals from orders relating to attachment is necessary.<sup>41</sup>

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35. See Cunningham, *supra* note 18, at 318-20.

36. *Id.* at 320.

37. MINN. STAT. § 605.09(d) (1965); Cunningham, *supra* note 18, at 318-20.

38. Town of Burnsville v. City of Bloomington, 262 Minn. 455, 115 N.W.2d 923 (1962); Bellows v. Ericson, 233 Minn. 320, 46 N.W.2d 654 (1951).

39. Town of Burnsville v. City of Bloomington, *supra* at 459, 115 N.W.2d at 926.

40. For a review of earlier case law under this section see Cunningham, *supra* note 18 at 321-22.

41. Earlier cases are discussed in Cunningham, *supra* note 18 at 322-23.



## C. ORDERS INVOLVING THE MERITS

*An appeal may be taken to the supreme court:*

. . .

*From an order involving the merits of the action or some part thereof . . .*

MINNESOTA STATUTES § 605.09(d) (1965).

This subsection is identical to Minnesota Statutes section 605.09(3) (1961), existing prior to the 1963 amendments. In 1963 the provision was repealed<sup>42</sup> in accordance with the suggestion of the Judicial Council.<sup>43</sup> When it became apparent that the repeal of this subsection, combined with the failure to enact the proposed discretionary appeal,<sup>44</sup> had caused a substantial contraction of the supreme court's jurisdiction,<sup>45</sup> it was re-enacted by the 1965 Legislature.<sup>46</sup>

The limits of this subsection are difficult to define. The court has stated the test to be "whether the order in effect finally determines the action or finally determines some positive legal right of the appellant relating thereto."<sup>47</sup> This definition places two limitations on the subsection. The first is the requirement of finality. Only those orders which represent the lower court's ultimate determination of the issue there involved are appealable. Secondly, the order must terminate the action or determine a positive legal right.<sup>48</sup> A positive legal right is one that is not subject to the sound discretion of the court.<sup>49</sup> However, those cases stating that an order entered in the discretion of the lower court does not determine a positive legal right probably mean no more than that an appellate court will not interfere with the discretion of an inferior tribunal in the absence of a showing of abuse of that discretion. It would seem that a party does have a positive legal right to be free of judicial acts made in abuse of discretion. Since any order turning in part on questions of fact does involve the exercise of discretion, a strict application of the discretionary limitation would severely limit the usefulness of this subsection.

Although these definitions have limited the scope of the subsection, it is difficult to determine the appealability of spe-

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42. Minn. Laws 1963, ch. 806, § 8.

43. MINN. LAWS SERV. 1958, p. 16.

44. *Id.* at 17.

45. See *Ginsberg v. Williams*, 270 Minn. 474, 135 N.W.2d 213 (1965).

46. Minn. Laws 1965, ch. 607, § 1.

47. *Nelson v. Glenwood Hills Hosps., Inc.*, 240 Minn. 505, at 510, 62 N.W.2d 73, at 77 (1953).

48. *Chapman v. Dorsey*, 230 Minn. 279, 41 N.W.2d 438 (1950).

49. *Ibid.*

cific orders solely by the application of these interpretations. The principal reason for this ambiguity is the approach taken by the court. It has chosen to define the subsection in terms of the rights of the parties. Since "rights" in this context refers only to that which the court decides to regard as rights, the definition is circular, providing no independent criterion by which the question of appealability can be determined. A more productive method would approach the problems raised by applying the underlying policies of judicial economy and efficiency. Although the application of these considerations will not produce results with mathematical certainty, it is submitted that, at the very least, a better perspective will be attained.

### 1. *Orders Compelling Defendant to Litigate*

An order denying a motion to set aside the summons and complaint<sup>50</sup> or to dismiss the action, or any part thereof,<sup>51</sup> made on jurisdictional grounds, has been held to be appealable. Accordingly, an order refusing to dismiss a third party complaint,<sup>52</sup> refusing to vacate an order substituting the movant as defendant,<sup>53</sup> or refusing to dismiss an appeal to the district court from a judgment entered in municipal court<sup>54</sup> is appealable if made on jurisdictional grounds. However, such orders are appealable only if they represent the lower court's final determination of the matter. If it is clear that the order was made only so a final ruling could be deferred to a later time, no appeal may be taken.<sup>55</sup>

These orders are appealable as orders involving the merits of the action since they determine positive legal rights by compelling the defendant to defend on the merits.<sup>56</sup> On grounds of judicial economy, such an appeal may be justified since, if suc-

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50. *Bubar v. Dizdar*, 240 Minn. 26, 60 N.W.2d 77 (1953); see *Danov v. ABC Freight Forwarding Corp.*, 266 Minn. 115, 122 N.W.2d 766 (1963); *Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 117 N.W.2d 732 (1962); *Brooks v. International Bhd. of Boilermakers*, 262 Minn. 253, 114 N.W.2d 647 (1962).

51. *Speyer v. The Savogran Co.*, 267 Minn. 67, 124 N.W.2d 827 (1963).

52. *Ehlers v. U.S. Heating & Cooling Mfg. Corp.*, 267 Minn. 56, 124 N.W.2d 824 (1963).

53. *Nelson v. Glenwood Hills Hosps., Inc.*, 240 Minn. 505, 62 N.W.2d 73 (1953).

54. *City Loan & Fin. Co. v. Fitch*, 265 Minn. 271, 212 N.W.2d 181 (1963).

55. *Butts v. Geisler*, 242 Minn. 154, 64 N.W.2d 147 (1954).

56. *Speyer v. The Savogran Co.*, 267 Minn. 67, 124 N.W.2d 827 (1963).

cessful, it would terminate the litigation and eliminate an unnecessary trial.

## 2. *Orders Granting or Denying Intervention*

The appealability of an order granting or denying intervention depends upon the nature of the petition for intervention. An order denying a motion to intervene as of right<sup>57</sup> has been held to be appealable.<sup>58</sup> Consistently with the position that an order made in response to a motion calling upon the sound discretion of the trial court is nonappealable as one involving the merits, it has been held that an order granting<sup>59</sup> or denying<sup>60</sup> a motion for permissive intervention<sup>61</sup> is nonappealable.

However, another distinction should be controlling here. Although the court has tended to treat orders granting and orders denying intervention alike, the considerations favoring appealability are not identical. An order denying a motion to intervene is final as to that matter. Since the movant will not then be a party to the final judgment, a denial of the right to appeal from the intervention order may foreclose all possibility of appellate review. However, if intervention is granted, all parties adversely affected may seek review of the order on appeal from the disposition of the case. A motion to intervene is analogous to a motion to dismiss on the ground that the complaint fails to state a claim upon which relief may be granted. An order granting intervention holds that the intervenor has stated a claim. Like an order refusing to dismiss for failure to state a claim,<sup>62</sup> it should be held nonappealable. In denying intervention, the lower court has dismissed the petition for

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57. See MINN. R. Civ. P. 24.01.

58. *Thibault v. Bostrom*, 270 Minn. 511, 134 N.W.2d 308 (1965). See *O. B. Thompson Elec. Co. v. Milliman & Larson, Inc.*, 268 Minn. 299, 128 N.W.2d 751 (1964), which involved an appeal by a third party lien holder from a denial of his motion to intervene in a proceeding to foreclose a mechanics lien; and *In re Sister Elizabeth Kenny Foundation, Inc.*, 267 Minn. 352, 126 N.W.2d 640 (1964), where there was an appeal from a denial of a motion by a charity to intervene in a proceeding to modify a charitable trust. See also *In re McDaniel*, 257 Minn. 78, 100 N.W.2d 497 (1959).

59. *State v. Bentley*, 224 Minn. 244, 28 N.W.2d 179 (1947); *In re Condemnation of Lands Owned by Luhrs*, 220 Minn. 129, 19 N.W.2d 77 (1945).

60. *Miller v. Market Men's Mut. Ins. Co.*, 262 Minn. 509, 115 N.W.2d 266 (1962).

61. See MINN. R. Civ. P. 24.02.

62. *Town of Burnsville v. City of Bloomington*, 262 Minn. 455, 115 N.W.2d 923 (1962).

intervention. Such an order should be appealable as an order dismissing with prejudice.<sup>63</sup>

### 3. Orders Dismissing the Action

Prior to the adoption of the Minnesota Rules of Civil Procedure it had been held that an order dismissing an action was an order for judgment and therefore nonappealable.<sup>64</sup> *Royal Realty Co. v. Levin*<sup>65</sup> found that holding to have been reversed by Rule 41.02(3) of the Minnesota Rules of Civil Procedure which provides:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this rule and *any dismissal not provided for in this rule* or in Rule 41.01, other than a dismissal for lack of jurisdiction or for lack of an indispensable party *operates as an adjudication upon the merits.* (Emphasis added.)<sup>66</sup>

The court held that since an order for dismissal has the effect of a dismissal on the merits, it is appealable as an order involving the merits. While this reasoning is somewhat less than compelling,<sup>67</sup> the holding has been consistently followed.<sup>68</sup> Apparently the same reasoning applies to an order dismissing a counterclaim.<sup>69</sup>

Consistent with the rationale of the *Royal Realty* case, it has been held that an order for dismissal found to be without prejudice is nonappealable.<sup>70</sup> However, in determining whether an order was entered with or without prejudice, the court does not construe the order according to the mandate of Rule 41.02(3). In *Voth v. Beckman*<sup>71</sup> an appeal was taken from an order vacating a prior order allowing service of a third party complaint. The

63. See *Royal Realty v. Levin*, 243 Minn. 30, 66 N.W.2d 5 (1954).

64. *E.g.*, *Quevli v. First Nat'l Bank of Windom*, 226 Minn. 102, 32 N.W.2d 146 (1948).

65. 243 Minn. 30, 66 N.W.2d 5 (1954).

66. The phrase "or for lack of an indispensable party" was added in 1959.

67. Probably the sentence in the rule was only intended to define the effect of an order of dismissal, designated as being with or without prejudice, upon a subsequent action on the same claim. The term "merits" as used in MINN. STAT. § 605.09(d) (1965) is a term of art having a very peculiar meaning. It need not follow that because the same word appears in Rule 41.02(3) the same meaning was intended.

68. See, *e.g.*, *Jeurissen v. Harbeck*, 267 Minn. 559, 127 N.W.2d 437 (1964); *Parkview Nursing Home, Inc. v. City of Minneapolis*, 266 Minn. 99, 123 N.W.2d 297 (1963); *Spanel v. Mounds View School Dist. No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962).

69. See *Northern States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26 (1963).

70. *Fischer v. Perisian*, 251 Minn. 166, 86 N.W.2d 737 (1957).

71. 250 Minn. 325, 84 N.W.2d 925 (1957).

case was remanded for a determination of whether the dismissal was with prejudice. Since the appealability of the order turned upon that question, the court explicitly refused to follow Rule 41.02(3).

#### 4. *Orders to Vacate Orders and Judgments*

##### (a) *Vacation of Orders*

The question of the appealability of orders made in response to motions to vacate another order or a judgment is complex and unsettled. An order vacating an appealable order is appealable since such an order determines a positive legal right of the appellant by depriving him of the benefit of a final disposition of the action, or a part thereof.<sup>72</sup>

However, an order denying a motion to vacate an appealable order is not appealable.<sup>73</sup> To allow an appeal from such an order, the court has ruled, would effectively eliminate the time limitations on the right to appeal from appealable orders.<sup>74</sup> Such an appeal would allow a party to move for a vacation after the time for appeal had expired and obtain review of the original order on appeal from the denial of the motion. The same rationale may be applicable to certain orders vacating appealable orders. Consequently, since the time limitations on the right of appeal are jurisdictional and may not be extended by consent of the parties or by the lower court, an order vacating an appealable order probably would be held nonappealable if made for the sole purpose of permitting a party to obtain appellate review of the original order.<sup>75</sup>

Although not designated as such, an order may be held nonappealable if it is, in effect, an order refusing to vacate an appealable order. In *City of Chaska v. Chaska Township*,<sup>76</sup> an appeal

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72. *Levi v. Longini*, 82 Minn. 324, 84 N.W. 1017 (1901); *Cunningham*, *supra* note 18. See *Blazek v. North Am. Life & Cas. Co.*, 265 Minn. 236, 121 N.W.2d 339 (1963).

73. *City of Chaska v. Chaska Township*, 271 Minn. 139, 135 N.W.2d 195 (1965); *Tryggeseth v. Norcross*, 262 Minn. 440, 115 N.W.2d 56 (1962); *Bennett v. Johnson*, 230 Minn. 404, 42 N.W.2d 44 (1950). *But see Schoenfeld v. Buker*, 262 Minn. 122, 114 N.W.2d 560 (1962) (order refusing to vacate a stipulation of dismissal appealed).

74. See *Barrett v. Smith*, 183 Minn. 431, 237 N.W. 15 (1931).

75. See *Tombs v. Ashworth*, 255 Minn. 55, 95 N.W.2d 423 (1959); *Weckerling v. McNiven Land Co.*, 231 Minn. 167, 42 N.W.2d 701 (1950). *But see Blomberg v. Tschida*, 269 Minn. 61, 130 N.W.2d 237 (1964). Alternatively, the court could allow the appeal and reverse the order of vacation as being made on erroneous grounds without reaching the question of the propriety of the order vacated.

76. 271 Minn. 139, 135 N.W.2d 195 (1965).

was taken from an order denying a motion for amended findings or a new trial.<sup>77</sup> Because the proceeding in the lower court was appellate in nature and not a trial, the motion for a new trial was improper. The court treated the motion as one for vacation of the prior order of the lower court affirming the action of an administrative agency. Thus the order appealed from was in substance an order refusing to vacate an appealable order and not appealable.<sup>78</sup>

Generally, no appeal may be taken from an order granting or denying a motion to vacate a nonappealable order.<sup>79</sup> If allowed, an appeal could be taken indirectly from any order and would effectively remove all limitations upon the jurisdiction of the supreme court. However, if the original order was nonappealable only because it was made *ex parte*, an order granting or denying a motion to vacate that order cures the defect and is appealable.<sup>80</sup>

#### (b) Vacating a Judgment

An order which expressly vacates or in effect vacates a previously entered judgment is appealable.<sup>81</sup> The greatest use of this rule has been to expand the narrow limits of the right to appeal from an order granting a new trial apparently demanded by Minnesota Statutes section 605.09(e). An order granting a new trial made subsequent to the entry of judgment effectively vacates the judgment and therefore is appealable as an order involving the merits.<sup>82</sup> However, the order granting

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77. An order denying a new trial is appealable. MINN. STAT. § 605.09(e) (1965).

78. The court could have treated the motion as a petition for rehearing. However, a denial of a petition for rehearing probably should not be appealable as is a denial of a new trial. The scope of review available on appeal from an order denying a new trial is different from that of an appeal from a final order or judgment. See 41 MINN. L. REV. 110, 143 (1956). The difference relates primarily to the scope of review of the sufficiency of the evidence. Since no evidence is introduced in an appellate proceeding in the district court, all that could be accomplished on appeal from a denial of a petition for rehearing could be done on appeal from the final order in the proceeding.

79. *Smith v. Illinois C.R.R.*, 244 Minn. 52, 68 N.W.2d 638 (1955); *Luethi v. Stanko*, 240 Minn. 380, 61 N.W.2d 522 (1953).

80. *Chapman v. Dorsey*, 230 Minn. 279, 41 N.W.2d 438 (1950).

81. *Blomberg v. Tschida*, 269 Minn. 61, 130 N.W.2d 237 (1964).

82. *Foster v. Herbison Const. Co.*, 263 Minn. 63, 115 N.W.2d 915 (1962); *Kjeldergaard v. Gulliford*, 260 Minn. 234, 109 N.W.2d 586 (1961); *Brown v. Bertrand*, 254 Minn. 175, 94 N.W.2d 543 (1959); *Weberg v. Chicago, M., St. P. & P.R.R.*, 239 Minn. 345, 59 N.W.2d 317 (1953). *Contra*, *Ginsberg v. Williams*, 270 Minn. 474, 135 N.W.2d 213 (1965) (order grant-

the new trial must itself vacate the judgment. If the judgment is vacated by a separate order made prior to the ruling on the motion for a new trial, only the order which vacates the judgment is appealable and the subsequent order granting a new trial may not be reviewed on that appeal.<sup>83</sup>

The rule that an order for a new trial which vacates the judgment is appealable makes the appealability of such orders turn on whether judgment was entered prior to the order, a consideration unrelated to the policies favoring or disfavoring such appeals. The irrelevancy of the sequence of entry causes the application of the rule to be rather inequitable. The inequity, however, could be substantially lessened by the elimination of two common practices. Certain trial courts have exercised their power to stay the entry of judgment<sup>84</sup> as a matter of course.<sup>85</sup> In other cases, clerks of court have ignored the command of Rule 58.01 that "judgment upon the verdict of a jury . . . shall be entered forthwith." To avoid prejudice to either party's right to appeal, judgment should be promptly entered.<sup>86</sup> The practice of staying entry of judgment may have resulted from the fact that the scope of review on appeal from a judgment is broader if the judgment was entered after an order denying a new trial.<sup>87</sup> However, if the judgment is entered prior to the order denying a new trial an appellant may preserve that advantage by taking his appeal from both the judgment and the order. The practice of automatically staying the entry of judgment by judicial act or clerical neglect has no justification and should be abandoned.

In considering the appealability of orders refusing to vacate judgments, a distinction must be made between unauthorized

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ing new trial which vacated judgment held nonappealable under 1963 statute). It could be argued that the detailed provisions of § 605.09(e) regarding appeal from an order granting a new trial should be regarded as the exclusive source of appellate jurisdiction as to such orders and should limit the more general provisions of the statute. However, by re-enacting the present 605.09(d) immediately following the *Ginsberg* decision, the legislature has evidenced a contrary intent.

83. *Blomberg v. Tschida*, 269 Minn. 61, 130 N.W.2d 237 (1964).

84. See MINN. R. CIV. P. 58.02.

85. See *Blomberg v. Tschida*, 269 Minn. 61, 130 N.W.2d 237 (1964). One judicial district has a rule automatically staying entry of judgment for thirty days, Rule 11, Special Rules of the Seventh Judicial District.

86. When the motion for new trial is denied, delay in the entry of judgment may result in an inequity of a different kind. If the new trial is denied before judgment is entered, an appeal may be taken from that order without a supersedeas bond being filed in the amount of the verdict. MINN. STAT. § 605.115(2) (1965).

87. See 41 MINN. L. REV. 110 (1956).

and erroneous judgments. An order denying a motion to vacate an unauthorized judgment is appealable. However, no appeal may be taken if the judgment attacked is asserted to be merely erroneous.<sup>88</sup> An erroneous judgment is one entered pursuant to a court order erroneously made. An unauthorized judgment is one entered by the clerk when no judicial order for judgment has been made.<sup>89</sup>

This distinction appears to be the result of the balancing of two competing considerations common to most problems concerning the appealability of orders granting or denying vacation of orders or judgments. First, appeals from such orders must be limited so that the finality of judgments and orders is not affected by an indefinite extension of the time for appeal. Secondly, in certain circumstances, appeal from an order made in response to a motion to vacate may be the only way in which the right of appeal can be made adequate. For example, the right to appellate review of an erroneous judgment is adequate in most cases if limited to an appeal from the judgment. However, unauthorized judgments, being the result of clerical error, frequently may not come to the attention of the party adversely affected until the time for appeal from the judgment has expired. By clearly defining what constitutes an unauthorized judgment, the finality of judgments is not affected seriously.

The need for an adequate appeal also seems to demand that in two instances an order refusing to vacate should be appealable even if the judgment is only attacked as erroneous. A default judgment entered against a party who has made no appearance in the action may escape the attention of that party until the time for appeal has expired. Since it is made *ex parte*, probably no appeal can be taken directly from such a default judgment.<sup>90</sup> Thus, only by allowing an appeal from an order ruling on a motion to vacate or modify that judgment will the party adversely affected be given any right to appellate review. On the other hand, a judgment by default entered against a defendant who has appeared in the action does not present the same problems. He has actual notice of the proceeding against

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88. *Weckerling v. McNiven Land Co.*, 231 Minn. 167, 42 N.W.2d 701 (1950); *Lafond v. Szczepanski*, 141 N.W.2d 485 (Minn. 1966).

89. See *Weckerling v. McNiven Land Co.*, *supra*. An order denying a motion to modify a default judgment to conform to the prayer for relief is appealable because such a motion attacks the judgment as being unauthorized. *Nelson v. Auman*, 221 Minn. 46, 20 N.W.2d 702 (1945); *Halvorsen v. Orinoco Mining Co.*, 89 Minn. 470, 95 N.W. 320 (1903).

90. See *Gederholm v. Davies*, 59 Minn. 1, 60 N.W. 676 (1894).



him. Since it is not *ex parte*, an appeal is available directly from the judgment. In such case the appeal from an order refusing to vacate serves no useful purpose.

It is not clear under what circumstances an order refusing to vacate a default judgment is appealable. While an order denying a motion to vacate a default judgment has been expressly held nonappealable,<sup>91</sup> appeals taken from orders of this kind have been heard and decided without discussion of the question of appealability.<sup>92</sup> In one recent case, the discussion of whether an appeal could properly be taken from the order in question apparently assumed that an order refusing to vacate a default judgment is appealable.<sup>93</sup> An order refusing to modify a default judgment has been held appealable.<sup>94</sup> There is no reason to distinguish between an order refusing to modify or amend a default judgment and one made in response to a motion to vacate such a judgment. The inclination of the court to treat both as appealable should be followed in future decisions, at least in those cases where the appellant has made no appearance in the action prior to entry of judgment.

In addition, the policy favoring the finality of judgments is inapplicable to appeals from orders refusing to vacate or amend a judgment which is not an inalterable determination of all rights of the parties. In a divorce action, for example, the trial court retains jurisdiction after the entry of a final decree or judgment so that its determination may be revised to accommodate any subsequent change in the circumstances of the parties.<sup>95</sup> So that lower courts will not be given an absolute and uncontrolled discretion in exercising this jurisdiction, an appeal from all final orders so entered is necessary. Thus, it has been held that an order denying a motion for a reduction of alimony previously awarded is appealable when the motion was made on the ground that the financial condition of the parties had changed.<sup>96</sup> Without discussion of appealability, the court has heard appeals taken from an order denying a motion to amend a divorce decree with

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91. *Weckerling v. McNiven Land Co.*, 231 Minn. 167, 42 N.W.2d 701 (1950).

92. See, e.g., *Finden v. Klaas*, 268 Minn. 268, 128 N.W.2d 748 (1964); *Sommers v. Thomas*, 251 Minn. 461, 88 N.W.2d 191 (1958).

93. *Lafond v. Sczepanski*, 141 N.W.2d 485 (Minn. 1966).

94. *Nelson v. Auman*, 221 Minn. 46, 20 N.W.2d 702 (1945); *Halvorson v. Orinoco Mining Co.*, 89 Minn. 470, 95 N.W. 320 (1903).

95. See, e.g., *Hellman v. Hellman*, 250 Minn. 422, 84 N.W.2d 367 (1957).

96. *Plankers v. Plankers*, 173 Minn. 464, 217 N.W. 488 (1928); *Haskell v. Haskell*, 119 Minn. 484, 138 N.W. 787 (1912).

regard to visitation rights<sup>97</sup> and from an order refusing to amend provisions of a divorce decree granting custody of children.<sup>98</sup> Appeals of this kind, however, should be limited by their purpose of recognizing a change in circumstances. An order denying a motion to amend or vacate should not be appealable if the motion only requests the lower court to reconsider its previous determination of the matter on the facts as presented in the original proceeding. Such an appeal would present no issues which could not have been raised on appeal from the original order or judgment and would unnecessarily diminish the finality of judgments.

#### D. NEW TRIAL ORDERS

*An appeal may be taken to the supreme court:*

*...  
From an order refusing a new trial, or from an order granting a new trial if the court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon errors of law occurring at the trial, and upon no other ground; and the court shall specify such errors in its order or memorandum, but upon appeal, such order granting a new trial may be sustained for errors of law prejudicial to respondent other than those specified by the trial court . . . .*

MINNESOTA STATUTES § 605.09(e) (1965).

Prior to the 1963 amendment this subsection of the statute contained a clause relating to orders sustaining or overruling demurrers. With the abolition of the demurrer<sup>99</sup> the language of that clause became obsolete and has been replaced with a new and separate section providing for certain appeals from two modern analogues of the demurrer: summary judgment and the motion to dismiss for failure to state a claim upon which relief can be granted.<sup>100</sup> No alteration in the provision regarding orders granting or denying a new trial was made in the 1963 revision.<sup>101</sup>

While it is frequently used, the clause allowing an appeal from an order denying a new trial has raised few difficulties. The provision has been construed to make appealable all orders which in effect deny a motion for new trial, notwithstanding

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97. *Bryant v. Bryant*, 264 Minn. 509, 119 N.W.2d 714 (1963).

98. *MacWhinney v. MacWhinney*, 248 Minn. 303, 79 N.W.2d 683 (1956).

99. MINN. R. CIV. P. 7.01.

100. MINN. STAT. § 605.09(i) (1965).

101. The Judicial Council suggested that all orders refusing or granting a new trial be made appealable. MINN. LAWS SERV. 1958 pp. 19-20.

any language used in the order or motion to the contrary. An order granting a motion for a new trial unless one party consents to a remittitur is appealable as an order refusing a new trial if the party consents.<sup>102</sup> However, an order made in response to a motion labeled as a motion for a new trial is not appealable if made in a proceeding in which there was no trial since such an order is in effect only an order refusing to vacate a prior order or judgment.<sup>103</sup>

The statutory restrictions on the appealability of orders granting a new trial have been strictly applied. For the order to be appealable, the error must be exclusively one of law. "It must clearly appear that no element of judicial discretion was exercised. If there is the slightest doubt at all, the order is not appealable."<sup>104</sup> In determining whether an order was made exclusively on errors of law, a memorandum of the lower court may be referred to for purposes of clarification but may not be used to impeach or contradict the order unless expressly made a part thereof.<sup>105</sup> The attitude of the court is aptly illustrated by *Noren v. Hankee*<sup>106</sup> where the order granting a new trial did not set forth the grounds upon which it was made, and the attached memorandum discussed only an error in the admission of evidence and concluded: "for reasons here given . . . it is hereby ordered that . . . a new trial [be] granted to the plaintiff."<sup>107</sup> The appeal was dismissed because the phrase "for these reasons" did not indicate with sufficient clarity that the order was made exclusively on the error in the admission of evidence.

In *Kelsey v. Chicago, R.I. & P.R.R.*,<sup>108</sup> the court indicated a willingness to abandon this strict construction. After considering the language of both the order and memorandum the court

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102. See *Prodger v. Zell*, 261 Minn. 508, 113 N.W.2d 168 (1962).

103. *City of Chaska v. Chaska Township*, 271 Minn. 139, 135 N.W.2d 195 (1965); *Samels v. Samels*, 174 Minn. 133, 218 N.W. 546 (1928).

104. *Von Bank v. Mayer*, 239 Minn. 492, 495, 59 N.W.2d 307 (1953). See, e.g., *Dubois v. Clark*, 253 Minn. 556, 93 N.W.2d 533 (1958); *Noren v. Hankee*, 241 Minn. 379, 63 N.W.2d 43 (1954).

105. *Leman v. Standard Oil Co.*, 246 Minn. 271, 74 N.W.2d 513 (1956); *McMillen v. Meyer*, 246 Minn. 132, 74 N.W.2d 393 (1956). In *Anderson v. Jennie*, 248 Minn. 369, 80 N.W.2d 41 (1956), the order granting a new trial stated it was made "solely and exclusively for errors of law occurring at the trial of said cause." 248 Minn. 369, 370, 80 N.W.2d 41, 42. Because the memorandum expressly made part of the order raised a doubt as to whether judicial discretion had in fact been exercised, the order was held nonappealable. See also *Kubinski v. Speckman*, 261 Minn. 475, 113 N.W.2d 173 (1962).

106. 241 Minn. 379, 63 N.W.2d 43 (1954).

107. 241 Minn. 379, 380, 63 N.W.2d 43, 44 (1954).

108. 262 Minn. 219, 114 N.W.2d 90 (1962).

concluded that there was doubt whether the order was based exclusively upon errors of law.<sup>109</sup> However, rather than dismissing the appeal as prior holdings would appear to demand, the court remanded the case to the trial court for a more precise statement of the grounds for the order. While the solution of *Kelsey* may result in delay in the ultimate disposition of the case,<sup>110</sup> some change in the approach of the court is clearly necessary. Since orders granting a new trial are frequently appealable under subsection 605.09(d),<sup>111</sup> no evident purpose is served by restrictively applying the "based exclusively on errors of law" language. The most satisfactory solution would be to resolve all ambiguities in favor of rather than against appealability. However, the *Kelsey* case should be followed in preference to earlier decisions.

#### E. ORDERS WHICH DETERMINE THE ACTION AND PREVENT JUDGMENT

*An appeal may be taken to the supreme court:*

...

*From an order which, in effect, determines the action, and prevents a judgment from which an appeal might be taken*

....

MINNESOTA STATUTES § 605.09(f) (1965).

No change in the substance or language of this subsection was made in the 1963 revision. Although by a liberal construction it could be of some use, this provision has been referred to by the court infrequently and is probably one of the least important subsections of the statute.<sup>112</sup> In *Phillips v. Brandt*,<sup>113</sup> a

109. 262 Minn. 219, 220, 114 N.W.2d 90, 91 (1962).

110. Delay in the ultimate disposition of the case, one of the primary reasons for not allowing intermediate appeals, is increased by remanding the case.

111. See notes 81-87 *supra* and accompanying text.

112. Cunningham lists four types of orders held appealable under this subsection: an order dismissing an action on jurisdictional grounds; an order dismissing an appeal taken to the district court; an order striking a complaint; and an order reinstating a judgment by vacating a prior order which vacated a judgment. Cunningham, *Appealable Orders in Minnesota*, 37 MINN. L. REV. 309 (1953). Any order of dismissal, unless made without prejudice, is now appealable as an order involving the merits. *Royal Realty Co. v. Levin*, 243 Minn. 30, 66 N.W.2d 5 (1954). An order dismissing an appeal was held appealable under the predecessor of subsection (h) as a final order entered in a special proceeding. *Gabel v. Ferodowill*, 254 Minn. 324, 95 N.W.2d 101 (1959). An order striking a complaint involves the merits and is appealable under subsection (d). See *Lovering v. Webb Publishing Co.*, 108 Minn. 201, 120 N.W. 688 (1909). It could be argued that an order reinstating a judgment is appealable as an order which vacates an appealable order.

113. 231 Minn. 423, 43 N.W.2d 285 (1950).

taxpayers' suit was brought to enjoin certain city officials from acting contrary to law. After judgment had been ordered for the plaintiff, he permanently left the city, thereby terminating his interest in the suit. Two other taxpayers then moved to be substituted as plaintiffs. Their motion was denied and they appealed from that order. The court acknowledged that the order appealed from did not, in the strictest sense, prevent "a judgment from which an appeal might be taken" since a judgment of dismissal in favor of the defendants could have been subsequently entered. However, subsection (f) was interpreted to allow an appeal to be taken from an order which prevents entry of a judgment previously ordered even though some other judgment could later be entered in the action.

A similar extension of the subsection was possible on the facts of *Wallace T. Bruce, Inc. v. Najarian*.<sup>114</sup> In a suit to foreclose a mechanic's lien, plaintiff appealed from an order staying all proceedings until twelve months after a pending bankruptcy proceeding was concluded. Since the plaintiff's claim would be lost if the lien were not perfected before the discharge in bankruptcy, the order effectively determined the action and prevented entry of judgment on the merits of plaintiff's claim. However, as stated in the *Najarian* case, no such expansion of subsection (f) is necessary because an order of this kind is clearly appealable as involving the merits. Thus, while the subsection is capable of application in a wider range of cases, such usage would not result in an expansion of appellate jurisdiction.

#### F. ORDERS OR JUDGMENTS SUPPLEMENTARY TO EXECUTION

*An appeal may be taken to the supreme court:*

...

*From a final order or judgment made or rendered in proceedings supplementary to execution . . . .*

MINNESOTA STATUTES § 605.09(g) (1965).

The only change effected by the 1963 amendments was the addition of the word "final." While this change was apparently made to conform the language of the provision to prior cases construing it,<sup>115</sup> one case decided under the previous wording may have been overruled thereby. *Freeman v. Larson*<sup>116</sup> held that the general rule that an order for judgment is not appeal-

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114. 249 Minn. 99, 81 N.W.2d 282 (1957).

115. See *West Publishing Co. v. DeLaMott*, 104 Minn. 174, 116 N.W. 103 (1908); MINN. LAW SERV. 1958 p. 20.

116. 199 Minn. 446, 272 N.W. 155 (1937).

able does not apply to orders made in proceedings supplementary to execution. Since in justifying the general rule the court has spoken of orders for judgment as being intermediate and interlocutory in character,<sup>117</sup> the court may find the exception of the *Freeman* case no longer valid. However, in view of the reluctance of the court to follow its decisions regarding orders for judgment,<sup>118</sup> the statutory change may be ignored in favor of the continued life of the *Freeman* holding.

This subsection applies only to proceedings under Minnesota Statutes section 575.

#### G. FINAL ORDER OR JUDGMENT IN SPECIAL PROCEEDINGS

*An appeal may be taken to the supreme court:*

. . .

*Except as otherwise provided by statute, from the final order or judgment affecting a substantial right made in a special proceeding, provided that the appeal must be taken within the time limited for appeal from an order . . . .*

MINNESOTA STATUTES § 605.09(h) (1965).

Several changes were made in this subsection by the 1963 revision. The introductory clause, "except as otherwise provided by statute," was added to clarify that all statutes regulating special proceedings containing provisions for appeals are in no part superseded by this subsection.<sup>119</sup> The addition may resolve one ambiguity in the case law. Several earlier decisions indicated that an order entered in a special proceeding, governed by a statute providing that appeals shall be had "as in civil actions," was appealable only if the order conformed to the requirements of the predecessor of subsection (h).<sup>120</sup> The added introductory clause could be read as repudiating these cases and making the whole of section 605.09 applicable under such special proceeding statutes.

The subsection was further amended to make it applicable to judgments as well as to final orders. In conjunction with this amendment, the proviso limiting the time for appeal from any determination of a special proceeding to that provided for appeals from orders was added. Under prior law a judgment entered in a special proceeding was appealable under the prede-

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117. See *Shema v. Thorpe Bros.*, 238 Minn. 470, 57 N.W.2d 157 (1953).

118. See notes 26-33 *supra* and accompanying text.

119. See MINN. LAW SERV. 1958 p. 21.

120. See, e.g., *Johnson v. City of Minneapolis*, 209 Minn. 67, 295 N.W. 406 (1940). See generally *Cunningham*, *supra* note 112, at 539. However, *Hanson v. Emanuel*, 210 Minn. 51, 297 N.W. 176 (1941), held that

cessor of subsection (a).<sup>121</sup> Presumably such an appeal could have been taken within the time allowed for appeal from judgments generally.<sup>122</sup>

Finally, the clause allowing an appeal to be taken from a final order "upon a summary application in an action after judgment"<sup>123</sup> was repealed. This clause was rarely referred to in decisions of the court and its omission probably has caused no contraction of appellate jurisdiction.<sup>124</sup>

The court has not formulated a meaningful and workable definition of the phrase "special proceeding"<sup>125</sup> but has categorized a large number of district court proceedings as being within this subsection.<sup>126</sup> Only by relying on direct precedent can it be determined whether a given order was entered in a special proceeding.

Only once has the court found an order entered in a special proceeding nonappealable on the ground that it did not affect "a substantial right." In *Town of Egan v. Minnesota Municipal Comm'n*,<sup>127</sup> the district court, in an appellate proceeding, reversed an order of the Municipal Commission. The supreme court dismissed the appeal of the Commission taken from the district court determination. It was held that no "substantial right" of the Commission was affected by the order from which the appeal was taken since the Commission was not a litigant in the district court proceeding. Thus, to be appealable under this

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such a provision in a special proceeding statute allows an appeal to be taken from an order denying a new trial as well as from a final order. See also *State v. Nelson*, 267 Minn. 70, 125 N.W.2d 166 (1963).

121. See *State v. Anderson*, 239 Minn. 144, 58 N.W.2d 257 (1953).

122. Before the 1963 amendments the time limitation for appeal from an order was thirty days. An appeal could be taken from a judgment within six months of its entry. MINN. STAT. § 605.08 (1965).

123. MINN. STAT. § 609(7) (1961).

124. Cunningham lists only two types of orders which had been held appealable under the clause: orders made on motion to vacate a judgment; and orders relating to satisfaction of a judgment. Cunningham, *supra* note 112 at 360-61. More recent decisions arising under the pre-1963 statute discussing the appealability of orders granting or denying a motion to vacate relied exclusively on the "involving the merits" subsection. See notes 72-80 *supra* and accompanying text. An order granting or denying a motion that the judgment be found to be satisfied probably is a final determination of the positive legal rights of the appellant and would, therefore, be appealable under the same subsection.

125. The most extensive attempted definition says no more than that a special proceeding is not an ordinary proceeding. *Chapman v. Dorsey*, 230 Minn. 279, 41 N.W.2d 438 (1950).

126. For an extensive, but admittedly not complete, list of these categories see Cunningham, *supra* note 112 at 352-53.

127. 269 Minn. 239, 130 N.W.2d 525 (1964).

subsection an order must not only affect a substantial right but must adversely affect a right of the appellant.

A final order has been defined as one which terminates the proceeding in the court making the order.<sup>128</sup> Apparently it is not a prerequisite to appealability that the order finally end the litigation between the parties. In *Morey v. School Bd. of Independent School Dist. No. 492*,<sup>129</sup> a writ of certiorari was sought in the district court to obtain review of an action taken by the School Board. An appeal was taken from the district court's order remanding the matter to the School Board for findings of fact. The supreme court held that since the order terminated the proceeding in the district court it was final and appealable. However, on appeal review was limited to those matters finally determined by the order. Thus, the court had jurisdiction only to determine whether the district court could properly remand to the School Board for findings of fact. Since the appeal was taken for the sole purpose of obtaining review of the School Board's action the holding was an effective denial of appellate relief. If followed, the *Morey* rationale would allow review of substantial questions in other circumstances. For example, suppose an appeal were taken to the district court from an order of an administrative agency or lower court which ruled upon two related but separable issues. If the district court in its order affirmed one of the issues and remanded the case for further proceedings on the other, the *Morey* case would appear to allow an appeal to be taken to the supreme court from that order. The merits of the issue finally determined and the propriety of remanding as to the other issue would be reviewable on that appeal. Contrary to the circumstances in *Morey*, such an appeal, even if limited in scope to one issue in the case, could be of substantial advantage to the appellant.

The result in *Morey* is not demanded by the language of the statute or by the need to insure the adequacy of the remedy of appeal. No appeal to the supreme court should be allowed from an order of the district court, sitting as an appellate court, unless the order is a complete and final resolution of the case.

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128. See *Morey v. School Bd. of Independent School Dist. No. 492*, 268 Minn. 110, 128 N.W.2d 302 (1964). Most of the problems which have given rise to the complex and inconsistent rules construing this phrase have not been presented in any recent cases and will not be discussed here. For an extensive review of earlier case law see Cunningham, *supra* note 110 at 353-59.

129. 268 Minn. 110, 128 N.W.2d 302 (1964).



## H. ORDERS REFUSING DISMISSAL OR SUMMARY JUDGMENT

*An appeal may be taken to the supreme court:*

...

*If the district court certifies that the question presented is important and doubtful, from an order which denies a motion to dismiss for failure to state a claim upon which relief can be granted or from an order which denies a motion for summary judgment.*

MINNESOTA STATUTES § 605.09(i) (1965).

This subsection is new but similar in substance to a provision in the old statute which allowed an appeal to be taken from certain orders overruling a demurrer.<sup>130</sup> After the elimination of the demurrer by the Minnesota Rules of Civil Procedure, the old statutory provision was construed to permit an appeal from orders denying summary judgment, judgment on the pleadings, or dismissal for failure to state a claim upon which relief can be granted, when such orders certified questions presented as important and doubtful.<sup>131</sup> Thus, the new subsection has the effect of codifying the holdings of the prior case law.

An order denying summary judgment which does not comply with the requirements of this subsection is not appealable.<sup>132</sup> Undoubtedly the same result would follow as to an order denying a motion to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted which certified no question as important or doubtful.<sup>133</sup>

While this subsection and its predecessor have been frequently used,<sup>134</sup> no problems of construction have arisen in their application. Since the terminology requires an affirmative and conscious act of certification by the district court, the difficulty of construing ambiguous orders has not been presented.

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130. Minn. Laws 1961, ch. 605, § .09(4).

131. See *Shumway v. Nelson*, 259 Minn. 319, 107 N.W.2d 531 (1961); *Stevens v. Lycan & Co.*, 259 Minn. 106, 105 N.W.2d 889 (1960); *House v. Hanson*, 245 Minn. 466, 72 N.W.2d 874 (1955). See also *Village of Roseville v. Sunset Memorial Park Ass'n*, 262 Minn. 108, 113 N.W.2d 857 (1962).

132. *In re Williams*, 263 Minn. 581, 116 N.W.2d 589 (1962).

133. See *Town of Burnsville v. City of Bloomington*, 262 Minn. 455, 115 N.W.2d 923 (1962); *Dady v. Petersen*, 219 Minn. 198, 17 N.W.2d 322 (1945).

134. See, e.g., *Glaesemann v. Village of New Brighton*, 268 Minn. 432, 130 N.W.2d 43 (1964); *Peopping v. Lindeman*, 268 Minn. 30, 127 N.W.2d 512 (1964); *Dahl v. Northwestern Nat'l Bank*, 265 Minn. 216, 121 N.W.2d 321 (1963).

## I. MISCELLANEOUS NONAPPEALABLE ORDERS

In conclusion, reference should be made to several classes of orders not previously discussed and which are nonappealable because they do not fall within the provisions of the statute.

An order directing that fraud be alleged in the complaint with more particularity and certainty is not appealable.<sup>135</sup> Certainly this rule would be followed as to any order relating to the pleading of special matters.<sup>136</sup> More broadly, the same principle would demand that any order made regarding the pleadings which does not finally determine the action or any part thereof be nonappealable.

Discovery orders have uniformly been found to be nonappealable.<sup>137</sup> The possibility that a discovery order may affect a legal right not related to the ultimate disposition of the case and that the error of the trial court may not be adequately remedied on appeal from the judgment has been accounted for by liberally allowing writs of prohibition to be issued to restrain enforcement of such orders. The advantage of the writ of prohibition is that it is discretionary rather than jurisdictional and thus allows an adequate remedy without opening a nebulous area in the appellate jurisdiction of the supreme court.<sup>138</sup>

Unless made on jurisdictional grounds, no appeal may be taken from an order denying a motion to dismiss the action.<sup>139</sup>

An order denying a motion for judgment notwithstanding the verdict has on several occasions been expressly held nonappealable.<sup>140</sup> However, in two recent cases appeals from such an order were heard and decided without discussion of the question of appealability.<sup>141</sup> Since such a reversal cannot be justified

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135. *Alho v. Sterling*, 266 Minn. 71, 122 N.W.2d 869 (1963).

136. See MINN. R. Crv. P. 9.

137. See, e.g., *Skutt v. Minneapolis Basketball Corp.*, 261 Minn. 577, 110 N.W.2d 495 (1961) (order allowing an inspection of corporate books); *In re Williams*, 254 Minn. 272, 95 N.W.2d 91 (1959) (order requiring a person to appear for the taking of a deposition); *In re Trusteeship of Melgaard*, 187 Minn. 632, 246 N.W. 478 (1933) (order granting in part and denying in part a motion to allow document discovery).

138. See notes 168-170 *infra* and accompanying text.

139. See *Town of Burnsville v. City of Bloomington*, 262 Minn. 455, 115 N.W.2d 923 (1962); *Independent School Dist. No. 84 v. Rittmiller*, 235 Minn. 556, 51 N.W.2d 664 (1952); *Dady v. Peterson*, 219 Minn. 198, 17 N.W.2d 322 (1945).

140. See *Caswell v. Minar Motor Co.*, 240 Minn. 213, 60 N.W.2d 263 (1953); *Muggenburg v. Leighton*, 240 Minn. 21, 60 N.W.2d 9 (1953); *Oelschlegel v. Chicago, G.W. Ry.*, 71 Minn. 50, 73 N.W. 631 (1898).

141. See *Hanson v. City of Minneapolis*, 261 Minn. 568, 113 N.W.2d 508 (1962).

by any of the current views of the court toward the statute these holdings appear to be the result of carelessness.

### III. EXTRAORDINARY WRITS

The instances in which the supreme court may issue an extraordinary writ to control the actions of lower courts must be considered as complementary to the law of appealable orders. Although the issuance of extraordinary writs is discretionary rather than as of right the policies behind each system are similar. While they are not the only extraordinary means by which the supreme court may control lower court action, the writs of prohibition and mandamus have been the most frequently used.

#### A. PROHIBITION

A writ of prohibition is issued only in an original proceeding in the supreme court. Upon application to the court, a writ may be issued provisionally commanding the respondent to show cause why he should not be permanently restrained from acting in the manner complained of and to refrain from so acting until the date of the hearing.<sup>142</sup> Upon final hearing of the matter, the court will discharge the writ or direct that it be made absolute.<sup>143</sup> As prerequisites to the final issuance of the writ it must be shown: (1) that the court, officer, or person to whom it is directed is about to exercise a judicial or semijudicial function; (2) that such exercise of power is not authorized by law; and (3) that, unless the writ is issued, an irreparable injury will be caused for which there is no remedy at law.<sup>144</sup>

Since this discussion is concerned only with the means by which the supreme court may control lower court action, it will be assumed that a judicial function is involved in all cases here relevant. However, the use of the future tense must be underscored. The nature of the writ of prohibition is preventative rather than corrective; its purpose is to restrain future actions or proceedings.<sup>145</sup> However, if a writ, preventative in purpose, is

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142. MINN. STAT. § 587.01 (1965).

143. MINN. STAT. § 587.05 (1965).

144. See *Brooks Realty, Inc. v. Aetna Ins. Co.*, 268 Minn. 122, 128 N.W.2d 151 (1964); *State ex rel. Ryan v. Cahill*, 253 Minn. 131, 91 N.W.2d 144 (1958); *Bellows v. Ericson*, 233 Minn. 320, 46 N.W.2d 654 (1951); *State ex rel. UERMW v. Enersen*, 230 Minn. 427, 42 N.W.2d 25 (1950); *State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N.W. 737 (1881).

145. See *State ex rel. Sheehan v. District Court*, 253 Minn. 462, 93 N.W.2d 1 (1958); *State ex rel. UERMW v. Enersen*, 230 Minn. 427, 42 N.W.2d 25 (1950); *Arrowhead Bus Serv., Inc. v. Black & White Duluth Cab Co.*, 226 Minn. 327, 32 N.W.2d 590 (1948).

granted, it may have the collateral effect of annulling prior proceedings.<sup>146</sup>

Although the phrase "unauthorized by law" appeared in early cases describing the writ of prohibition,<sup>147</sup> until recently it was clear that the phrase referred only to an exercise of power in excess of the lower court's jurisdiction.<sup>148</sup> More recent decisions have modified this rule by allowing the writ to be used to restrain enforcement of orders entered in abuse of the lower court's discretion.<sup>149</sup> These holdings indicate that no generic class of order or proceeding is exempt from the reaches of the writ. However, the court has recently reaffirmed that prohibition is an extraordinary remedy which is not available in usual circumstances.<sup>150</sup>

Apparently the nature of the lower court action is a limiting factor. The court has shown a greater willingness to use prohibition when the single question presented is important to the development of the law as well as to the determination of the litigation.<sup>151</sup> The inclination to review cases presenting important questions of law is desirable, particularly as to many pre-trial orders from which appeal is so remote and unsatisfactory that only prohibition provides the means to properly supervise and advise the trial courts. For example, an order which erroneously allows a party discovery of certain information may have no adverse effect on the trial if the information is not admitted as evidence. While a discovery order may be assigned as error on appeal from the judgment, it would not be grounds for reversal. Even if the supreme court discussed the issue in its opinion, the effect on the administration of the discovery system

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146. See, e.g., *Juster v. Grossman*, 229 Minn. 280, 38 N.W.2d 832 (1949).

147. See, e.g., *State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N.W. 737 (1881).

148. See, e.g., *Bellows v. Ericson*, 233 Minn. 320, 46 N.W.2d 654 (1951); *Heinsch v. Kirby*, 222 Minn. 352, 24 N.W.2d 493 (1946); *State ex rel. Roberts v. Hense*, 135 Minn. 99, 160 N.W. 198 (1916). See generally *Riesenfeld, Bauman & Maxwell, Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota*, 36 MINN. L. REV. 434, 443-44 (1952).

149. E.g., *Weidel v. Plummer*, 243 Minn. 476, 68 N.W.2d 245 (1955); *State ex rel. Hierl v. District Court*, 237 Minn. 456, 54 N.W.2d 5 (1952); *State ex rel. Stenstrom v. Wilson*, 254 Minn. 570, 48 N.W.2d 513 (1951).

150. *Thermorama, Inc. v. Shiller*, 271 Minn. 79, 135 N.W.2d 43 (1965).

151. In *Ginsberg v. Williams*, 270 Minn. 474, at 480, 135 N.W.2d 213, at 218 (1965), it was stated: "[W]e are of the opinion that prohibition . . . is clearly available to test the narrow question of the court's power to grant a new trial in the interests of justice." See *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W.2d 649 (1955).

would be less satisfactory than a direct reversal of the erroneous order. Moreover, there is good reason for denying review of questions turning in part on factual considerations. Since prohibition is an original proceeding in the supreme court, no record is brought up from the lower court and the hearing must be conducted on affidavits and other evidence submitted directly to the court. This procedure is neither an appropriate nor a well suited means to review questions of fact.<sup>152</sup>

The third prerequisite to the issuance of a writ of prohibition, that there is no other remedy by which the relator may redress the alleged injury, presents the most substantial limitation. The writ may be denied because the error can be corrected on application to a lower court. In *Craigmile v. Sorenson*,<sup>153</sup> the defendant sought prohibition to restrain further proceedings because a bond posted by plaintiff did not conform to the statute. In discharging the writ, the court held that the proper remedy was to apply to the court below for an order correcting the deficiencies in the bond. However, in *Payne v. Lee*<sup>154</sup> prohibition was sought to restrain a probate judge, allegedly disqualified because of bias, from hearing the matter. Although the court noted that a more suitable remedy could be obtained by applying to the *district* court for a writ of mandamus,<sup>155</sup> the writ of prohibition was made absolute.<sup>156</sup> The *Payne* case would appear to be clearly inconsistent with the position that prohibition is proper only when *no* other remedy is available. Considerations of judicial administration favor a result contrary to *Payne*. The time and energies of the supreme court ought to be reserved for those cases which must necessarily come before it. All matters which can be adequately disposed of by lower courts ought to be left to their exclusive jurisdiction.

The writ will usually be denied when an order from which an appeal may be taken is forthcoming in the lower court,<sup>157</sup> but the court has not ruled consistently as to the availability of the writ to restrain enforcement of an order which is itself appeal-

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152. The sharp disagreement of the court in *Shacter v. Richter*, 271 Minn. 87, 135 N.W.2d 66 (1966), was probably due in part to the presence of a fact question.

153. 241 Minn. 222, 62 N.W.2d 846 (1954).

154. 222 Minn. 269, 24 N.W.2d 259 (1946).

155. At the time of the *Payne* decision district courts were empowered to issue writs of mandamus. The district courts do not presently have this power. MINN. R. CIV. P. 81.01(2).

156. 222 Minn. at 279, 24 N.W.2d at 265.

157. *Marine v. Whipple*, 259 Minn. 18, 104 N.W.2d 657 (1960); *State ex rel. Ryan v. Cahill*, 253 Minn. 131, 91 N.W.2d 144 (1958).

able. *Ginsberg v. Williams*<sup>158</sup> held the writ available to restrain an order granting a new trial on an erroneous ground. The *Ginsberg* case aptly illustrates a difficulty encountered in many prohibition cases. The legislature has by statute limited the right to appeal from an order granting a new trial.<sup>159</sup> Although a considerable loss of time and effort will be caused by any erroneous order granting a new trial, it would seem that the court is bound by the legislative determination that the statutory remedy of appeal is adequate. In most prohibition decisions the opinions fail to indicate clearly what circumstances make the usually adequate remedy of appeal so inadequate as to make extraordinary relief appropriate. *Ginsberg* appears to rest on the fact that the legal question presented was narrow and important to the development of the law.<sup>160</sup> But the remedy of appeal is not made less adequate by the narrowness and importance of the question. The only conclusion that can be drawn is that the court will ignore the lack of adequate remedy requirement in such cases.

In *State ex rel. Beede v. Funck*<sup>161</sup> the appealability of the order sought to be restrained was held to constitute an adequate remedy making prohibition unavailable. In *Bellows v. Ericson*,<sup>162</sup> the writ was sought to restrain an order construed to be an alternative temporary mandatory injunction. Although the order sought to be restrained was found appealable, the writ was made absolute since the time for appeal had elapsed and an appeal from the *final* disposition of the case would not remedy the injury claimed. Because the order of the lower court was ambiguous, its appealability was not obvious. Thus, at least on the facts presented, the *Bellows* result is correct. A contrary result would put the complaining party to a choice between two remedies, neither of which is clearly proper, and would penalize an erroneous choice by complete forfeiture of appellate review. However, prohibition should not, in cases of this kind, be allowed as a means of circumventing the time limitation on the right to appeal. Although the possibility of a surprise forfeiture would not be eliminated, the writ should not lie if applied for more than

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158. 270 Minn. 474, 135 N.W.2d 213 (1965).

159. MINN. STAT. § 605.09(d), (e) (1965).

160. The writ was granted in *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W.2d 649 (1955), for the express purpose of settling an important question relating to discovery procedure.

161. 211 Minn. 27, 299 N.W. 684 (1941).

162. 233 Minn. 320, 46 N.W.2d 654 (1951). See *State ex rel. Turnblad v. District Court*, 259 Minn. 228, 107 N.W.2d 307 (1960); *Jenswold v. St. Louis County Welfare Bd.*, 247 Minn. 60, 76 N.W.2d 639 (1956).

thirty days after entry of the appealable order.

Pretrial orders, including discovery orders, cause great difficulty with the "no other adequate remedy" requirement and are best resolved by balancing the competing considerations in each case. Generally the writ will lie to restrain an erroneous action that is certain to nullify the whole of an extensive proceeding to follow. Thus, prohibition is usually available to restrain a lower court from proceeding in a matter over which it has no jurisdiction.<sup>163</sup> In *Anderson v. Anderson*,<sup>164</sup> a writ was made absolute to restrain a district court judge from proceeding in a case after an affidavit of prejudice had been filed against him.<sup>165</sup> Prohibition was granted in *Brooks Realty, Inc. v. Aetna Ins. Co.*<sup>166</sup> to restrain the effect of an erroneous determination that certain issues in the action were barred by collateral estoppel. The court held that the lack of adequate remedy requirement is met when a "waste of time, expense, and effort will likely result" if the lower court is not restrained.<sup>167</sup> In *State ex rel. Ryan v. Cahill*,<sup>168</sup> prohibition was sought to restrain an order to show cause why certain subpoenas to appear for the taking of depositions should not be quashed. The court discharged the writ, holding the proper remedy to be an appeal from the final order of the court in the show cause proceeding. Since the relator's position may prevail in that proceeding, the court not only adhered to the policy of deferring the writ of prohibition to the right of appeal but also may have eliminated the need for any recourse to the supreme court.

In several cases the court has shown a willingness to review discovery orders made incident to an action pending before the trial court by means of the writ of prohibition.<sup>169</sup> In each of these cases the lack of the "no other adequate remedy" requirement was either ignored or dismissed with the bare statement that an appeal would not be adequate. Several arguments can be advanced in support of the availability of the writ. In many

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163. *Independent School Dist. No. 524 v. Johnson*, 263 Minn. 573, 117 N.W.2d 390 (1962); *State ex rel. Turnbladh v. District Court*, 259 Minn. 228, 107 N.W.2d 307 (1960); *Jesmer Co. v. Wierdemann-Hjelm Corp.*, 250 Minn. 485, 85 N.W.2d 207 (1957).

164. 260 Minn. 573, 110 N.W.2d 293 (1961).

165. See MINN. R. Civ. P. 63.03.

166. 268 Minn. 122, 128 N.W.2d 151 (1964).

167. *Id.* at 128, 128 N.W.2d at 155.

168. 253 Minn. 131, 91 N.W.2d 144 (1958).

169. See, e.g., *Boldt v. Sanders*, 261 Minn. 160, 111 N.W.2d 225 (1961); *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W.2d 649 (1955); *Juster v. Grossman*, 229 Minn. 280, 38 N.W.2d 832 (1949).

cases a clearly erroneous discovery order may not affect the conduct of the trial and therefore will not be grounds for reversal of the judgment. Nevertheless, such orders may affect the substantial rights of a party which are not directly connected with the litigation.<sup>170</sup> Clearly the remedy of appeal is not adequate in such circumstances. Furthermore, erroneous orders may nullify the whole of the subsequent trial if not restrained. The desire to eliminate waste would demand that the writ be made available in such a case.

Recently the court has suggested that, at least as to pretrial orders, prohibition will be allowed more sparingly in the future. In an opinion emphasizing the extraordinary nature of the writ, *Thermorama, Inc. v. Shiller*,<sup>171</sup> it was stated that:

[Prohibition] will be used only in those cases where it appears that the court is about to exceed its jurisdiction or where it appears the action of the court relates to a matter that is decisive of the case; where the court has ordered the production of information clearly not discoverable and there is no adequate remedy at law; or in rare instances where it will settle a rule of practice affecting all litigants.<sup>172</sup>

The court apparently intended to limit the scope of prohibition to selective cases falling within the definition because it added that the court should not "undertake a review of any other than exceptional pretrial orders prior to trial."<sup>173</sup> Not all orders of the classes in the court's definition can be said to be exceptional. However, no further indication was given as to what exceptional circumstances will make the writ available.

Two factors must be compromised in forming a workable and appropriate definition of the scope of prohibition. First, there must be a degree of certainty. If the nature of the writ is wholly indefinite, much waste and inconvenience will result from at-

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170. In *Thermorama, Inc. v. Shiller*, 271 Minn. 79, 135 N.W.2d 43 (1965), for example, the relator alleged that the discovery order in question would force him to divulge trade secrets.

171. *Ibid.*

172. *Id.* at 84, 135 N.W.2d at 47 (1965). Standing alone, this definition could be read as effecting a considerable expansion of the remedy. However, it must be assumed, in view of the apparent limiting intent of the opinion, that the court will continue to require that it be shown that there is no other adequate remedy and that the effect of the writ will be to restrain rather than to correct error.

By indicating that the writ will issue where the lower court's action relates to a matter which may be decisive of the case, the court has introduced a new element into the law of prohibition. Even in those cases where the writ has been granted to restrain acts which could determine the action, the court has never relied on that fact as justifying the remedy.

173. *Id.* at 85, 135 N.W.2d at 47.



tempted uses later held to be improper. On the other hand, a rigid definition will destroy its principal advantages. If the writ is available in certain strictly limited categories and only in those instances, it ceases to be a discretionary remedy and becomes a writ of right. It is the purpose of prohibition to do justice in those circumstances where all other remedies are inadequate to accommodate those unforeseen cases which will not be properly resolved by preconceived formulae. This purpose is served only when its limitations are flexible. These two considerations are best harmonized in a definition which sets forth principles to be applied to individual cases with as much detail as possible. A definition which establishes classes of orders which may be reviewed by prohibition cannot attain the necessary flexibility without expanding the scope of the writ far beyond its purposes.

The inclination of the court to withdraw from its earlier liberality in allowing prohibition as a means of reviewing pre-trial orders is desirable. The lack of restrictions on the writ allows it to become an avoidance of many of the limitations on the right of appeal. In effecting this reversal two limitations should be clearly established.

First, the court should abandon its practice of discussing the merits of the relators' assertions in all cases. If the petition fails to satisfy the procedural limitations of the writ nothing further should be said. While it may seem wasteful to omit such a discussion after the merits have been fully argued before the court, prohibition practice cannot be effectively regulated if a full review can be had in every case.

Second, the applicability of the lack of adequate remedy requirement to pretrial orders should be more fully developed. There are instances where no disposition of the case on an appeal can correct action complained of because the order will not affect the validity of the trial or judgment.<sup>174</sup> Prohibition should be allowed in such cases only if the order will cause substantial prejudice to the relator.<sup>175</sup> Inconvenience should not be an adequate justification of the remedy unless extraordinarily burdensome. In other cases, while the matter could be adequately corrected on appeal after the trial, the error of the lower court's

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174. For example, the trial court may order discovery of information not admissible as evidence in the trial.

175. The court should depart from this standard only when an important question of law is involved which has never been ruled upon by the court and is unlikely to arise in the exercise of its appellate jurisdiction.

action may invalidate the entire subsequent course of the litigation. A pretrial remedy in such circumstances could eliminate the waste of an erroneous trial. However, in this type of situation prohibition should be allowed only when it is virtually certain that the error would be grounds for reversal of a verdict against the relator. A mere possibility that the error could invalidate the trial should not be sufficient.

#### B. MANDAMUS

Mandamus is distinguished from prohibition in that its function is to compel rather than to restrain.<sup>176</sup> However, the requirements essential to the issuance of the two writs are generally similar.

The supreme court has jurisdiction only to issue writs of mandamus directed to district courts or judges thereof acting in an official capacity.<sup>177</sup> Upon application an alternative writ may be issued directing the district court to perform the specified act or to show cause before the supreme court why the act should not be required.<sup>178</sup> After a full hearing of the matter, the alternative writ will be discharged or a peremptory writ issued unconditionally requiring the act in question to be done.

It is provided by statute that the writ of mandamus "may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion."<sup>179</sup> This language has been construed to be only a statement of the general principle that in usual circumstances an appellate court will not interfere with the exercise of discretion by a lower tribunal. However, mandamus will issue to compel a district court to reverse an order "so arbitrary and capricious as to constitute a clear abuse of discretion."<sup>180</sup> Like

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176. MINN. STAT. § 586.01 (1965).

177. MINN. STAT. § 586.11 (1965). Without explanation of its deviation from the statutory limitation, in *City of St. Paul v. Sutherland*, 270 Minn. 61, 132 N.W.2d 280 (1964), a peremptory writ was issued by the supreme court directed to a municipal court.

178. MINN. STAT. § 586.03 (1965). A peremptory writ may be issued in the first instance when the right of the relator to require the act and the lack of any excuse for non-performance is clear. MINN. STAT. § 586.04 (1965).

179. MINN. STAT. § 586.01 (1965).

180. *Baker v. Connolly Cartage Corp.*, 239 Minn. 72, 74, 57 N.W.2d 657, 658 (1953); *accord*, *Niazi v. St. Paul Mercury Ins. Co.*, 265 Minn. 222, 121 N.W.2d 349 (1963); *State ex rel. Laurisch v. Pohl*, 214 Minn. 221, 8 N.W.2d 227 (1943); *State ex rel. Felton v. Stolberg*, 128 Minn. 537, 150 N.W. 924 (1915).

prohibition, mandamus will not lie "where there is a plain, speedy, and adequate remedy in the ordinary course of law."<sup>181</sup>

From the language of the statute and the general principles developed in its construction, it would seem that the function of mandamus would be parallel to that of prohibition, prohibition being available to restrain erroneous acts of certain types and mandamus being proper to compel action as to similar matters. However, the law has not developed in this way. Rather, mandamus has generally been permitted with much less liberality and has been established as a proper means of reviewing district court activity only in certain circumstances. It is often applied in those circumstances without regard to its positive nature.

The writ of mandamus is frequently used to compel a district court to hear cases over which it has jurisdiction.<sup>182</sup> The court has indicated that the writ may issue to compel a district court to retain and exercise jurisdiction notwithstanding its order for a stay pending arbitration<sup>183</sup> or for a continuance<sup>184</sup> if the lower court order is shown to be clearly erroneous. Mandamus may be used to compel a district court to disregard an order for a new trial entered in excess of its jurisdiction and to determine the case on the record presented in the trial completed.<sup>185</sup>

It has been established that mandamus is the proper means to obtain review of any determination as to venue. The writ will lie to compel a district court to remand the case to the court of a different district<sup>186</sup> or to compel such court to vacate its order remanding the case to another court and to retain jurisdic-

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181. MINN. STAT. § 586.02 (1965). See *McLean Distrib. Co. v. Brewery & Beverage Drivers*, 254 Minn. 204, 94 N.W.2d 514 (1959).

182. *Zaine v. Zaine*, 265 Minn. 105, 120 N.W.2d 324 (1963); *State ex rel. Mattheisen v. District Court*, 261 Minn. 422, 113 N.W.2d 166 (1962); *McLean Distrib. Co. v. Brewery & Beverage Drivers*, 254 Minn. 204, 94 N.W.2d 514 (1959).

183. See *Niazi v. St. Paul Mercury Ins. Co.*, 265 Minn. 222, 121 N.W.2d 349 (1963).

184. See *Baker v. Connolly Cartage Corp.*, 239 Minn. 72, 57 N.W.2d 657 (1953).

185. *Mingo v. Holleran*, 153 Minn. 521, 191 N.W. 416 (1922). However, an order for new trial may not be attacked by mandamus on the ground that it is erroneous. See *Allison v. Chicago, G.W. Ry.*, 244 Minn. 435, 70 N.W.2d 278 (1955); *Waterhouse v. Branden*, 234 Minn. 351, 48 N.W.2d 330 (1951).

186. *Agricultural Ins. Co. v. Midwest Technical Dev. Corp.*, 269 Minn. 325, 130 N.W.2d 497 (1964); *First Nat'l Bank v. F. M. Distrib., Inc.*, 267 Minn. 34, 124 N.W.2d 506 (1963); *Miller v. Anchor Cas. Co.*, 233 Minn. 87, 45 N.W.2d 705 (1951).

tion.<sup>187</sup> However, mandamus may not be obtained in the supreme court before the matter of venue has been presented to and ruled upon by the district court.<sup>188</sup>

It has been held that the writ will not lie to review the propriety of an order granting or denying a motion to amend a pleading.<sup>189</sup> While no other cases involving pretrial orders have been decided, it can safely be assumed that such orders are not subject to review by mandamus.

Mandamus is the proper remedy to test an order denying a motion to settle a case.<sup>190</sup> However, since a motion to settle a case after the statutory time limit is addressed to the sound discretion of the trial court, a peremptory writ will be issued only if that discretion is abused.<sup>191</sup> Mandamus has also been established as the proper means to compel the district court to observe a mandate of the supreme court.<sup>192</sup>

#### IV. CONCLUSION

A consistent, fair, and reasonable system of appellate jurisdiction can be developed in Minnesota only if the rules as to appealable orders and the extraordinary writs are regarded as directed toward a common end. If the objectives of both are not substantially identical, each will tend to cancel out the limitations of the other. For example, to liberally allow extraordinary writs to issue during the course of litigation will have an effect on both the trial and appellate court levels similar to that resulting from a permissive attitude toward interlocutory appeals.

However, the extraordinary writs and the appeal do serve separate functions. While the limitations on appealable orders could be relaxed to accommodate by appeal most of what is now

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187. See *Fara v. Great No. Ry.*, 269 Minn. 573, 130 N.W.2d 142 (1964); *State ex rel. Security State Bank v. District Court*, 150 Minn. 498, 185 N.W. 1019 (1921).

188. *Hassing v. Zahalka*, 240 Minn. 177, 60 N.W.2d 86 (1953).

189. *Allum v. Federal Cartridge Corp.*, 226 Minn. 363, 32 N.W.2d 589 (1948); *Desjardins v. Emeraldite Surfacing Prods. Co.*, 189 Minn. 356, 249 N.W. 576 (1933).

190. *State v. Independent School Dist. No. 31*, 263 Minn. 438, 116 N.W.2d 711 (1962); *State v. Atanosoff*, 138 Minn. 321, 164 N.W. 1011 (1917).

191. *Vessel v. Greenlee*, 255 Minn. 305, 96 N.W.2d 382 (1959); *State ex rel. Felton v. Stolberg*, 128 Minn. 537, 150 N.W. 924 (1915).

192. *Jallen v. Agre*, 265 Minn. 578, 122 N.W.2d 207 (1963); *Holden v. Farwell, Ozmun, Kirk & Co.*, 227 Minn. 243, 34 N.W.2d 920 (1948); *Personal Loan Co. v. Personal Fin. Co. of St. Paul*, 213 Minn. 239, 6 N.W.2d 247 (1942).

accomplished by use of the extraordinary writs, there are substantial reasons to prefer one over the other in many circumstances. The statute governing the right to appeal is jurisdictional.<sup>193</sup> If a statutory provision is construed to allow an appeal from a given type of order, the supreme court must hear all appeals from such orders. The statute allows the court no discretion even when special circumstances seem to require that the generally applied rules governing appealability be relaxed. On the other hand, the extraordinary writs issue in the discretion of the court.<sup>194</sup> The availability of the remedy may be limited to those cases in which extraordinary circumstances demand extraordinary relief, without encouraging a multiplicity of petitions which will be disruptive of the system as a whole.

Further differences are apparent. For example, it may be suggested that an expansion of the scope of prohibition would be an adequate substitute for the discretionary appeal. However, because prohibition is an original proceeding in the supreme court, the writ is not well suited to the development of complex factual issues. Prohibition is best adapted to handle those cases in which a single question of law is presented and thus is not appropriate in all cases demanding a discretionary appeal. In addition, the extraordinary writs are generally more expedient than an appeal.<sup>195</sup> There seems no reason to give the discretionary appellant a position preferred to that of the appellant as of right.

As has been indicated, many incongruities and inconsistencies exist in Minnesota appellate practice. To effectively resolve these ambiguities, it is submitted that there must be an increasing awareness by the courts of the interdependency between the extraordinary writs and the appeal as of right; and yet, it must also be realized that the separate nature and function of each prevents indiscriminate substitution.

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193. See, e.g., *Tryggeseth v. Norcross*, 262 Minn. 440, 115 N.W.2d 56 (1962), *Butts v. Geisler*, 242 Minn. 154, 64 N.W.2d 147 (1954).

194. See, e.g., *Brooks Realty, Inc. v. Aetna Ins. Co.*, 268 Minn. 122, 128 N.W.2d 151 (1964) (prohibition); *Craigmile v. Sorenson*, 241 Minn. 222, 62 N.W.2d 846 (1954) (prohibition); *State ex rel. Hennepin County Welfare Bd. v. Fitzsimmons*, 239 Minn. 407, 58 N.W.2d 882 (1953) (mandamus), *State ex rel. Brenner v. Hodapp*, 234 Minn. 365, 48 N.W.2d 519 (1951) (mandamus).

195. See MINN. STAT. §§ 587.01-.05 (1965) (prohibition), MINN. STAT. §§ 586.01-.12 (1965) (mandamus).